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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 William Richard Dickson,

10 Plaintiff,

11 v.

12 Travelers Casualty Insurance Company of
13 America,

14 Defendant.

No. CV-23-01906-PHX-DJH

ORDER

15 This matter involves an insurance dispute arising out of a car accident. Defendant
16 Kristy Brown (“Defendant Brown”) previously filed a Motion to Dismiss Plaintiff William
17 Richard Dickson’s (“Plaintiff”) claims against her under Federal Rule of Civil Procedure
18 12(b)(6). (Doc. 10). The Court granted this motion. (Doc. 41). Now, Defendant Brown
19 seeks attorney’s fees of \$20,044.00 under A.R.S. § 12-341.01(A), Federal Rule of Civil
20 Procedure 54 and Arizona District Court Local Rule 54.2, arguing that Plaintiff’s claims
21 were not meritorious. (Doc. 47). The matter is fully briefed. (Docs. 49, 53). The
22 Court will award Defendant Brown the fees she seeks.

23 **I. Background**

24 Plaintiff was involved in a two-car-collision with non-party Timothy Schneider.
25 (Doc. 1-2 at ¶ 18). Plaintiff alleges he incurred \$151,182.00 of medical expenses due to
26 this collision. (*Id.* at ¶ 19). Mr. Schneider’s insurance gave Plaintiff the full \$100,000.00
27 limit under his policy. (*Id.* at ¶ 20). Plaintiff notified his insurance company, Defendant
28 Travelers Casualty Insurance Company of America (“Defendant Travelers”), of the

1 underinsured claim, but it and Defendant Brown (Travelers claims adjustor) failed to
2 resolve his claim in good faith. (*Id.* at ¶¶ 21–25).

3 Due to this “bad faith conduct” Plaintiff sued Defendant Brown, Defendant “John
4 Doe” Brown, Defendant Travelers (collectively “Defendants”), and other unknown parties
5 and corporations who may have caused or contributed to his claims in Arizona state court.¹
6 (*Id.* at 2). Plaintiff purported to bring the following causes of action against Defendant
7 Travelers and Defendant Brown:

- 8 • breach of contract (*Id.* at ¶¶ 30–33);
- 9 • breach of the covenant of good faith and fair dealing (*Id.* at ¶¶ 34–36);
- 10 • declaratory judgment seeking a declaration that clarifies the “parties’
11 rights and obligations” under the policy (*Id.* at ¶¶ 27–29).

12 Plaintiff seeks declaratory relief, monetary damages and attorney’s fees from Defendants.
13 (*Id.* at 5).

14 The Court previously dismissed Plaintiff’s claims for breach of contract, breach of
15 the covenant of good faith and fair dealing, and declaratory judgment against Defendant
16 Brown. (Doc. 41 at 9). The Court dismissed the breach of contract claim because it found
17 that Plaintiff had not alleged that Defendant Brown was a party to the policy—which is a
18 requirement to a breach claim under Arizona law. (*Id.* at 5 (citing *Riverwalk Condo. Unit*
19 *Owners Ass’n v. Travelers Indem. Co.*, 2018 WL 3774084, at *2 (D. Ariz. June 28, 2018)).
20 The Court dismissed Plaintiff’s claim for breach of the covenant of good faith and fair
21 dealing against Defendant Brown because “Defendant Brown is an insurance adjuster for
22 Defendant Travelers, therefore, she ‘cannot be directly liable for breaching the covenant of
23 good faith and fair dealing because [she] is not a party to the insurance contract from which
24 that covenant derives.’ ” (*Id.* at 6 (quoting *McGhee v. Sedgwick Claims Mgmt. Servs. Inc.*,
25 2019 WL 1598032, at *2 (D. Ariz. Apr. 15, 2019)). Finally, the Court dismissed the only
26 remaining claim against Defendant Brown, Plaintiff’s declaratory judgment claim, because
27 Plaintiff did not allege Defendant Brown was a party to the contract and “[t]here cannot be

28 ¹ The Court terminated any unknown, unidentified parties after the Notice of Removal was
filed. (Doc. 9).

1 an ‘actual controversy’ regarding a contract which Defendant Brown is not a party to.”
 2 (*Id.* at 8 (quoting 28 U.S.C. § 2201(a)).² The Court granted Plaintiff leave to amend their
 3 Complaint but noted that any claims for “breach of contract, breach of the covenant of good
 4 faith and fair dealing, or declaratory judgment against Defendant Brown would still fail as
 5 a matter of law—as illustrated above.” (*Id.* at 9).

6 Now, Defendant Brown seeks fees associated with her involvement in this matter:
 7 \$20,011.00 for 83.5 total hours billed as well as \$33.00 for costs associated with delivering
 8 a courtesy copy of their Motion to Dismiss to the Court. (Doc. 47 at 9).

9 **II. Legal Standard**

10 A party seeking an award of attorneys’ fees must show it is (1) eligible for and (2)
 11 entitled to an award, as well as that the amount sought is (3) reasonable. LRCiv 54.2(c).
 12 Eligibility and entitlement to an award is dependent on “the applicable statutory or
 13 contractual authority upon which the movant seeks an award[.]” LRCiv 54.2(c)(1).
 14 Defendant Brown specifically seeks fees under A.R.S. § 12-341.01(A), which provides that
 15 in “any contested action arising out of a contract, express or implied, the court may award
 16 the successful party reasonable attorney’s fees.” This award “should be made to mitigate
 17 the burden of the expense of litigation to establish a just claim or a just defense.” *Id.* at §
 18 12-341.01(B).

19 Diversity jurisdiction provides the sole basis for this Court’s jurisdiction. “A federal
 20 court sitting in diversity applies state law in deciding whether to allow attorney’s fees when
 21 those fees are connected to the substance of the case.” *Larry’s Apartment*, 249 F.3d 832,
 22 838 (9th Cir. 2001). To award attorneys’ fees under Section 12-341 the Court must find
 23 that this action “*arises out of a contract*, that Defendants are the ‘successful’ or prevailing
 24 party, that an award of attorneys’ fees is appropriate, and that the requested fees are

25
 26 ² The Court notes that Plaintiff advanced the following argument against dismissal of the
 27 declaratory judgment claim, which shows an absence of any justification: “Having worked
 28 for a federal judge and having worked as insurance defense counsel for the better part of
 two-decades (including time on the Arizona insurance defense board), I find both the
 arguments of Brown and absence of well-established authorities a great concern in terms
 of the communication with the Court.” (Doc. 13 at 5).

reasonable.” *Kaufman v. Warner Bros. Ent. Inc.*, 2019 WL 2084460, at *4 (D. Ariz. May 13, 2019) (citing *Lexington Ins. Co. v. Scott Homes Multifamily Inc.*, 2016 WL 5118316, at *2 (D. Ariz. Sept. 21, 2016) (emphasis added)). “Ultimately, any award under A.R.S. § 12-341.01 ‘should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense.’ ” *Id.* (quoting A.R.S. § 12-341.01(B)). “The award ‘need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid.’ ” *Id.* (quoting A.R.S. § 12-341.01(B)). Trial courts “have broad discretion when determining whether to award fees under § 12-341.01(A).” *Karon v. Safeco Ins. Co. of Am.*, 2021 WL 5416632, at *2 (D. Ariz. Nov. 19, 2021) (citing *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985) (en banc)).

III. Discussion

Defendant Brown seeks \$20,011.00 in attorney’s fees and \$33.00 in nontaxable costs for defending against Plaintiff’s claims. (Doc. 47 at 1). Plaintiff narrowly argues that Arizona Rule of Civil Procedure 54(g) requires a request of fees in the principal motion to recover fees, and because Defendant Brown did not make this request, she is not entitled to fees. (Doc. 49 at 2–3). The Court will first address this initial matter before turning to the factors enumerated in Local Rule 54.2(c).

A. Arizona Rule of Civil Procedure 54(g)

Plaintiff argues that ARCP 54(g) requires a request of fees in the principal motion to recover fees. Indeed, this *procedural* rule requires that “[a] claim for attorney’s fees must be made in the pleadings or in a Rule 12 motion before the movant’s responsive pleading.” Ariz. R. Civ. P. 54(g)(1). However, federal procedure provides otherwise. *See FaulknerUSA, Inc. v. Durrant Grp., Inc.*, 2014 WL 12696934, at *1 (D. Ariz. Jan. 29, 2014) (citing Fed. R. Civ. P. 54(d)(2)(A)). So, since this is a federal diversity action, the Court will apply the State’s substantive requirements (A.R.S. § 12-341.01(A)—but not its procedural requirements (ARCP 54(g)). *See Larry’s Apartment*, 249 F.3d at 838; *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 419 (1996). (“Under the *Erie*

1 doctrine, federal courts sitting in diversity apply state substantive law and federal
 2 procedural law.”); *Bldg. Innovation Indus., L.L.C. v. Onken*, 473 F. Supp. 2d 978, 986 (D.
 3 Ariz. 2007) (noting that A.R.S. § 12–341.01(A) is “is substantive in nature”). Therefore,
 4 Defendant Brown’s failure to include a request for fees in her Motion to Dismiss (Doc. 10)
 5 does not preclude her from seeking reasonable fees here.

6 **B. Eligibility**

7 Defendant Brown is eligible for an award of reasonable attorney’s fees under A.R.S.
 8 § 12-341.01(A) as she was the successful party in this litigation. (Doc. 41). As each of
 9 these claims were premised on the existence of an alleged contract, “Defendants are
 10 eligible for a fee award under A.R.S. § 12-241.01(A) for the work performed defending
 11 these claims.” *Kaufman v. Warner Bros. Ent. Inc.*, 2019 WL 2084460, at *5 (D. Ariz. May
 12 13, 2019) (citing *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 974–75
 13 (9th Cir. 2011) (holding that the defendant was eligible for an award of attorneys' fees for
 14 work performed on the plaintiff's claims for breach of contract and the duty of good faith
 15 and fair dealing, as these claims were “explicitly premised on the existence of an implicit
 16 contract that the district court found did not exist”); *see also Chaurasia v. Gen. Motors*
 17 *Corp.*, 126 P.3d 165, 177 (Ariz. Ct. App. 2006) (“A defendant seeking attorneys’ fees under
 18 A.R.S. § 12–341.01(A) need not be a party to the contract forming the basis for the
 19 award.”).

20 **C. Entitlement**

21 “Mere eligibility under § 12-341.01(A) does not establish entitlement to fees.
 22 Rather, the court must exercise its discretion to determine whether attorneys’ fees should
 23 be awarded.” *Kaufman*, 2019 WL 2084460, at *5 (citations omitted). Arizona courts
 24 typically consider the following six factors to determine entitlement to fees under Section
 25 12-341.01(A):

- 26 (1) whether the unsuccessful party had a meritorious claim;
- 27 (2) whether the legal question presented was novel;
- 28 (3) whether litigation could have been avoided such that the successful party’s
 efforts were superfluous;

- (4) whether fees against the unsuccessful party would result in extreme hardship;
- (5) whether the successful party prevailed in all respects, and;
- (6) whether an award would discourage parties with tenable claims from litigating legitimate contract issues out of fear of incurring attorney fees.

See Karon, 2021 WL 5416632, at *2. “No single factor can be determinative and the court is to weigh all of the factors in its exercise of its discretion.” *Cheeks v. Gen. Dynamics Corp.*, 2014 WL 5465285, at *3 (D. Ariz. Oct. 28, 2014) (citation omitted). The Court will address each factor in turn.

1. Merits & Novelty of Plaintiff’s Claims

Here, the merits of Plaintiff’s claim and its novelty are related, and so, the Court addresses these factors together. The Court concluded that none of Plaintiff’s claims against Defendant Brown could be maintained due to well settled principles of Arizona law. (Doc. 41). The Court specifically found that Plaintiff had not plausibly alleged his breach of contract claim, could not bring a claim for breach of the covenant of good faith and fair dealing against Defendant Brown under Arizona law, and his declaratory judgment claim would be duplicative and was not plausibly alleged due to 28 U.S.C. § 2201(a)’s actual controversy requirement. (*Id.* at 4–8). Given the existence of binding authority on these issues, the Court finds that Plaintiff’s claims were neither meritorious nor novel. *Karon*, 2021 WL 5416632, at *2.

2. Avoidance of Litigation

This litigation was avoidable. “This factor looks primarily to whether a non-litigation solution was not pursued that could have solved the problem and whether litigation was not necessary.” *11333, Inc. v. Certain Underwriters at Lloyd’s, London*, No. CV-14-02001-PHX-NVW, 2018 WL 1570236, at *6 (D. Ariz. Mar. 30, 2018). Defendant Brown states that she attempted to avoid the litigation after suit by repeatedly attempting to get Plaintiff to dismiss the “knowingly improper” suit against her to no avail. (Doc. 47 at 5). Plaintiff has not responded to this argument. (Doc. 49). Litigation was indeed unnecessary as the claims against Defendant Brown were ultimately dismissed based on

1 well settled law. (Doc. 41 at 9). So, this factor weighs in favor of Defendant Brown's
2 entitlement to reasonable attorney's fees. *Karon*, 2021 WL 5416632, at *2.

3 **3. Extreme Hardship**

4 Plaintiff has not argued any hardship or asserted that the fees Defendant Brown
5 seeks would cause extreme hardship. (Doc. 49). Thus, without any objection from
6 Plaintiff, this factor weighs in favor of granting fees. *See Garcia v. Salt River Project*
7 *Agric. Improvement & Power Dist.*, 618 F. Supp. 2d 1092, 1099 (D. Ariz. 2007) (citing
8 LRCiv. 7.2(i)) ("Generally, a party's failure to respond to arguments in a motion 'may be
9 deemed consent to the denial or granting of the motion and the Court may dispose of the
10 motion summarily.'").

11 **4. Prevailing Party & Discouragement of Legitimate Claims**

12 These two final factors also weigh towards granting fees. Defendant Brown
13 undoubtedly prevailed in all respects as the Court dismissed all of Plaintiff's claims against
14 her. (Doc. 41 at 9); *see also Basmajian v. Compass Bank*, 2018 WL 3023295, at *4 (D.
15 Ariz. Mar. 20, 2018) (finding that the defendant prevailed in all respects where the court
16 dismissed all claims against them). Furthermore, a chilling effect due to granting fees in
17 this case is unlikely as Plaintiff's claims were not meritorious. (Doc. 41 at 9). Instead, an
18 award of fees may serve to deter such plaintiffs from filing similarly frivolous lawsuits.
19 *Ajman Stud v. Cains*, 2020 WL 5034219, at *5 (D. Ariz. July 21, 2020), ("[A]n award of
20 attorneys' fees in this case may serve to deter others in this field from engaging in similar
21 conduct as [the] [d]efendants.").

22 In sum, the above factors weigh in favor of Defendant Brown's entitlement to
23 attorney's fees.

24 **D. Reasonableness**

25 Now that the Court has addressed Defendant Brown's entitlement and eligibility to
26 fees, it will address the reasonableness of her fees sought. "The award of reasonable
27 attorney fees [under Section 12-341.01] should be made to mitigate the burden of the
28 expense of litigation to establish a just claim or a just defense. It need not equal or relate to

1 the attorney fees actually paid or contracted, but the award may not exceed the amount paid
2 or agreed to be paid.” A.R.S. § 12-341.01(B).

3 “In determining reasonable attorneys’ fees in commercial litigation, the ‘beginning
4 point . . . of a reasonable fee is the . . . the actual billing rate which the lawyer charged in
5 the particular matter.” *Admiral Ins. Co. v. Cmty. Ins. Grp. SPC LTD.*, (quoting *Schweiger*
6 *v. China Doll Rest.*, 673 P.2d 927, 931 (Ariz. Ct. App. 1983) (Arizona courts hold that “in
7 corporate and commercial litigation between fee-paying clients, there is no need to
8 determine the reasonable hourly rate prevailing in the community for similar work because
9 the rate charged by the lawyer to the client is the best indication of what is reasonable under
10 the circumstances of the particular case”). The party opposing the fee award “must provide
11 specific references to the record and specify which amount of items are excessive.” *In re*
12 *Indenture of Tr. Dated Jan. 13, 1964*, 326 P.3d 307, 319–20 (Ariz. Ct. App. 2014). An
13 award may be reduced for hours not “reasonably expended.” *Travelers Indem. Co. v.*
14 *Crown Corr, Inc.*, 2012 WL 2798653, at *6 (D. Ariz. July 9, 2012).

15 Under the Arizona Supreme Court's Rules of Professional Conduct and Local Rule
16 54.2(c)(3), the following factors are to be considered in determining the reasonableness of
17 an attorney fee request:

- 18 • the time and labor required;
- 19 • the novelty and difficulty of the questions involved;
- 20 • the skill requisite to perform the legal service properly;
- 21 • the likelihood, if apparent to the client, that the acceptance of the
22 particular employment will preclude other employment by the lawyer;
- 23 • the fee customarily charged in the locality for similar legal services;
- 24 • the amount involved and the results obtained;
- 25 • the time limitations imposed by the client or by the circumstances;
- 26 • the nature and length of the professional relationship with the client;
- 27 • the experience, reputation, and ability of the lawyer or lawyers
28 performing the services;
- the degree of risk assumed by the lawyer;
- whether the fee contracted between the attorney and the client is fixed or
contingent, the “undesirability” of the case, and awards in similar actions.

Cains, 2020 WL 5034219, at *5 (citing A.R.S. Sup. Ct. Rules, Rule 42, Rules of Prof.

1 Conduct, ER 1.5; LRCiv. 54.2(c)(3)).

2 **1. Counsel’s Hourly Rates and her Experience, Skill and Ability**

3 Defendant Brown states that her counsel, Amy M. Samberg, is a senior equity
4 partner with Clyde & Co US, LLP, who has more than thirty years of experience
5 representing insurance companies in insurance coverage litigation. (Doc. 47 at 10). Based
6 on this, the Court finds that counsel in this matter had adequate experience, reputation, skill
7 and ability.

8 Ms. Samberg states in her Affidavit in Support that she billed a fixed rate of \$300
9 per hour on this matter until November of 2023 when she increased her rates to \$375 per
10 hour. (Doc. 47-1 at 3). This rate is presumed to be reasonable. *See Schweiger v. China*
11 *Doll Rest., Inc.*, 673 P.2d 927, 931–32 (Ariz. Ct. App. 1983) (“the rate charged by the
12 lawyer to the client is the best indication of what is reasonable under the circumstances of
13 the particular case.”).

14 **2. Time and Labor Required**

15 Defendant Brown’s counsel billed a total of 83.5 hours in connection with this
16 action, resulting in the total fees billed being \$20,011.00. Defendant Brown states that his
17 includes hours billed to defend against Plaintiff’s claims as well as the time spent preparing
18 this Motion. (Doc. 47 at 9). Generally, the prevailing party is “entitled to recover a
19 reasonable attorneys’ fee for every item of service which, at the time rendered, would have
20 been undertaken by a reasonable and prudent lawyer to advance or protect his client’s
21 interest[.]” *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1313 (9th
22 Cir. 1982). Overall, the Court finds the time and labor required to represent Defendant
23 Brown as accounted for in the billing entries are accurate and reasonable (Doc. 47-2). *See*
24 LRCiv 54.2(e)(2) (“The party seeking an award of fees must adequately describe the
25 services rendered so that the reasonableness of the charge can be evaluated.”).

26 **3. Preclusion of Other Employment and Time Constraints**

27 Counsel states that she was not precluded from other employment because of the
28 acceptance of this action and that Defendant Brown did not impose any time limitations

1 upon her other that the deadlines imposed by procedural rules. (Doc. 47 at 10).

2 **4. The Novelty and Difficulty of the Issues**

3 Defendant Brown notes that the Court’s decision turned-on bedrock principles of
4 Arizona law, but that “significant legal research was required to identify the case law
5 required to properly raise the defense of lack of privity as applied to an insurance adjuster.”
6 (Doc. 47 at 10). Indeed, the issues involved in the Motion to Dismiss were not novel. Nor
7 would the Court describe the issues raised in the Motion as “difficult”—especially for
8 someone with Ms. Samberg’s experience in insurance litigation.

9 **5. The Amount Involved, Degree of Risk and Desirability of the Case**

10 Counsel states that this case was not particularly undesirable, but that the amount at
11 stake here was \$178,071.93 based on Plaintiff’s sought damages as well as consequential
12 damages, punitive damages, fees and costs. (Doc. 47 at 10). Defendant Brown did not
13 address the risk involved here. Ms. Samberg also states that this case “was not particularly
14 undesirable.” (*Id.* at 11).

15 **6. Awards in Similar Actions**

16 Defendant Brown points the Court to two similar cases where the Court granted
17 similar fees in similar actions: *Stud v. Cains*, 2020 WL 5034219 (D. Ariz. July 21, 2022).
18 Indeed, within this district, other Courts have awarded similar total fees to what Defendant
19 Brown seeks. *See e.g.*, 11333, Inc., 2018 WL 1570236, at *6 (finding that an hourly rate
20 of \$500.00 “is within the Phoenix market for highly skilled, experienced, and regarded
21 lawyers for complex high-dollar commercial litigation”); *Cheeks*, 2014 WL 5465285, at
22 *7 (D. Ariz. Oct. 28, 2014) (awarding \$24,720.00 for 74 hours of work in preparing a
23 motion for summary judgment which resulted in the dismissal of a breach of contract
24 counterclaim).

25 These factors, when considered in the aggregate, demonstrate that the fees
26 Defendant Brown seeks are reasonable.

27 **E. Total Award**


28 The Court finds, in conclusion, that Defendant Brown has shown that she is eligible

1 for and entitled to fees for defending against Plaintiff's claims. She has also shown that
2 the fees she seeks are reasonable. So, the Court will grant Defendant Brown \$20,011.00
3 for 83.5 total hours incurred in defending against Plaintiff's claims and preparing this Fee
4 Motion. The Court will also award her \$33.00 for nontaxable costs associated with
5 delivering a courtesy copy of the Motion to Dismiss to chambers. *See* A.R.S. § 12-341
6 ("The successful party to a civil action shall recover from his adversary all costs expended
7 or incurred therein unless otherwise provided by law.").

8 Accordingly,

9 **IT IS ORDERED** that Defendant Brown's Motion for Attorney's Fees (Doc. 47)
10 is **GRANTED**. Plaintiff shall pay \$20,044.00 in attorney's fees and costs to Defendant
11 Brown within 60 days of this Order. Defendant Brown shall file a notice of satisfaction
12 **within 7 days** of receipt of the full amount of fees and costs as outlined in this Order.

13 Dated this 11th day of February, 2025.

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15 
16 Honorable Diane J. Humetewa
United States District Judge
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